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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

KENNETH CHENEY, Plaintiff and Appellant, v. LIBORIO GASTELUM et al., Defendants and Respondents.	B237096 (Los Angeles County Super. Ct. No. PC047576)

APPEAL from a judgment of the Superior Court of Los Angeles County. Burt Pines, Judge. Affirmed.

Tiedt & Hurd, John E. Tiedt, Marc S. Hurd for Plaintiff and Appellant.

Kerry, Garcia & Lewis, Daniel G. Lewis for Defendants and Respondents.

Encountering a dangerous situation on the freeway, plaintiff and appellant Kenneth Cheney delayed in braking. A few seconds later, he slammed into another motorist. Cheney sued the driver (and his employer) who initially caused the perilous conditions. A jury awarded Cheney damages, but found that he was 70 percent at fault for causing the accident, and that 30 percent of his injuries were the result of not wearing a seatbelt. Cheney appeals, arguing that he was held to an improperly high standard of care, that his injuries were not related to his failure to wear a seatbelt, and that the trial court exhibited bias toward him and his counsel. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On January 18, 2010, Liborio Gastelum, an employee of Keldon Paper Company, Inc. (Keldon), was driving a box truck for Keldon on the southbound I-5 freeway near Sylmar. It was raining heavily and visibility was low. Gastelum suddenly lost control of the truck, veered wildly across the freeway, and stopped near the southbound No. 1 lane.

Kyle Crocker, an off-duty police officer, was driving southbound about 50 to 55 miles per hour when he saw the out-of-control truck. He braked in a controlled manner and was able to stop about three to four feet short of the truck.

Kenneth Cheney was several car lengths behind Crocker, driving his 2005 Chevrolet Avalanche about 65 miles per hour. He was not wearing a seatbelt. Cheney slowed down but was still traveling approximately 42 miles per hour when he crashed into Crocker's vehicle. Crash data retrieval information showed that Cheney took his foot off the accelerator about six seconds before impact but did not apply his brakes until 1.6 seconds before impact. No steering movement was detected until one second before impact. Crocker estimated that he had been stopped for about three to four seconds before Cheney crashed into him. As a result of the crash, Cheney sustained a badly fractured right patella, which required multiple surgeries and resulted in a permanent disability.

Cheney brought suit against Gastelum and Keldon. Both defendants cross-complained for contribution and indemnity relating to third party subrogation claims for property damages claims paid.

The case was tried to a jury from April 13 through April 22, 2011. The jury found that defendants' negligence was a substantial factor in causing the accident and the injuries to Cheney, but that Cheney himself was also negligent. Cheney's total damages were found to be $251,376. However, the jury found Cheney to be 70 percent responsible for causing the accident and that 30 percent of his injuries were the result of not wearing a seatbelt.

Cheney thereafter filed a motion for new trial, which was denied. The final judgment reflected a total verdict in favor of Cheney of $46,093, accounting for various reductions based on Cheney's negligence and other miscellaneous reductions. After subtracting Cheney's verdict from amounts already paid out by defendants, and accounting for defendants' own share of liability, judgment was entered in favor of defendants in the amount of $51,206.[1]

DISCUSSION

Cheney makes several arguments on appeal. First, he contends that defendants' expert witness improperly testified that the standard of care applicable to Cheney should be determined by reference to how the off-duty police officer, Crocker, reacted to the dangerous driving conditions. Next, Cheney contends that there was no substantial evidence to support the determination that Cheney would have been less injured if he wore a seatbelt. Finally, Cheney argues that the trial court judge exhibited bias against Cheney's counsel, necessitating a new trial before a different judge.

I. Expert testimony relating to the crash

The first issue addresses three separate sections in Cheney's opening brief. Cheney contends (i) the trial court improperly permitted expert testimony on the law of negligence and the application of a faulty standard of care; (ii) the trial court should have ordered a new trial because the verdict was not supported by substantial evidence and

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[1] The record shows a later "[Proposed] Amended Judgment on Special Verdict." Since the document in the record is unsigned and is only "proposed," we do not reference it.

violated the law; and (iii) there was no substantial evidence to support a 70 percent contributory negligence verdict against Cheney. Each of these assertions are premised on the same purported error: defendants' expert witness was improperly allowed to testify that Cheney should be held to a standard of care equivalent to the care exhibited by the off-duty police officer, Crocker.

In support of this argument, Cheney points to the testimony of the defense-retained accident reconstruction expert, Stephen Blewett. The ostensibly offending testimony went as follows: "Q. And what opinions have you developed? A. That there was—from the time that—well, as they first begin, we notice that Mr. Cheney is basically closing in on the Crocker vehicle at about 15 miles per hour. So it's getting closer. So what is available to Mr. Cheney to view is that he is certainly approaching this vehicle that is doing 15 miles an hour slower than he in the No. 2 lane. We also see that at the point that Mr. Crocker begins braking hard, his vehicle, the brake lights would certainly be visible to Mr. Cheney; that is, the Crocker brake lights. So there's notice of something going on. And when you see how quickly that the Crocker vehicle was slowing, it's giving an indication that there's something going on up in front and that you should be thinking about taking some action. It's not until four and a half seconds after the Crocker vehicle braked and almost literally to a stop that Mr. Cheney gets on his brakes. That's only 1.7 seconds before impact. *So what we see is that if Mr. Cheney had just thought about putting the brakes on a second before, this accident would not have occurred.* We have four and a half seconds that nothing occurred during the braking process, and that—We typically look at a perception reaction for someone putting the brakes on in front of us where we have to stop, about a second and a half. So we have—where we can take a second and a half, we could actually take three seconds there for perception-reaction before getting on the brakes to avoid this accident." (Italics added.) According to Cheney, this testimony, by which the defense expert drew the conclusion that Cheney was inattentive in his driving, required the jury to substitute the general reasonably careful person standard of care with the standard of care employed by an off-duty police officer trained in defensive driving techniques.

Notably, Cheney's counsel objected neither to the question nor the response. That, in itself, is fatal to Cheney's argument, as he has failed to preserve the issue for appeal. (Evid. Code, § 353; *Arreola v. County of Monterey* (2002) 99 Cal.App.4th 722, 749-750.) "A timely objection allows the trial court to exercise its sound discretion with respect to admissibility of expert testimony." (*Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 346.) No timely objection was made here.

Even if the issue were preserved for review, however, we fail to see how the highlighted testimony was in any manner objectionable. Generally, the opinion of an expert is admissible when it is "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . . ." (Evid. Code, § 801, subd. (a); see *Summers v. A. L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1184.) "A party cannot rely upon an expert's opinion to establish duty, which is a question of law for the court." (*Thompson v. Sacramento City Unified School Dist.* (2003) 107 Cal.App.4th 1352, 1373.) However, "[t]estimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." (Evid. Code, § 805.)

The defense expert's testimony clearly was not used to establish a duty. Cheney, as a driver on a public highway, had a duty to act as a reasonably careful person would under similar circumstances. Nor do we agree that the defense expert's testimony could have caused the jury to supplant this regular standard of care with a higher standard. The testimony instead tended to show that Cheney should have had warning that a perilous situation lay in his path. Crocker's brake lights should have been visible to Cheney four and a half seconds prior to the time that Cheney started to brake. The statement that Cheney could have avoided the accident by braking just a second earlier did not hold Cheney to Crocker's standard— rather, if Cheney had braked a second earlier, he still would have braked three and a half seconds later than Crocker. At most, the defense expert's testimony embraced the ultimate issue to be decided by the jury—whether Cheney acted as a reasonably careful person; such testimony is allowed under Evidence Code section 805.

Moreover, Cheney himself called an expert in the field of accident reconstruction, who testified that Cheney would not have been as alert to the dangerous situation because he was behind Crocker and did not have a clear line of sight. Cheney's expert testified that Cheney was attentive and careful. The jury, as the trier of fact, was entitled to believe either or neither expert's testimony. The jury was also provided with relevant jury instructions, including CACI Nos. 401 and 452, which describe the "reasonably careful person" standard of care. CACI No. 452 specifically applies to sudden and unexpected emergency situations.

Nothing in the record suggests that the jury disregarded any pertinent instructions, and the defense expert's testimony provides no ground for reversal.

II. Expert testimony relating to seatbelt use

Both sides retained experts to testify regarding the effect of Cheney's failure to use a seatbelt. Both experts testified that, even if Cheney had worn a seatbelt, it is likely that his knee would have contacted the "knee bolster" during the accident. The experts differed, however, on the injury that Cheney would have sustained. Plaintiff's expert testified that Cheney would have fractured his patella even if he had worn a seatbelt. Defendants' expert testified that fracture would not have been likely.

The gist of Cheney's argument is that defendants' expert was not qualified to testify on the issue. Defendants' expert did not have a degree in biomechanics, and had only "some understanding of the human anatomy." However, he did have a doctorate in engineering, completed a post-doctorate program in forensic sciences, had taught courses covering the issue of biomechanics, and had studied the effects of seatbelt use since approximately 1980. It does not appear from the record that the witness was unqualified to testify on the effect of seatbelt use. Furthermore, Cheney did not object to the qualifications of the expert. This failure to object renders the claim forfeited. (Evid. Code, § 720, subd. (b); *In re Joy M.* (2002) 99 Cal.App.4th 11, 19.)

III. Alleged trial court bias

Finally, Cheney argues that the trial court exhibited bias by repeatedly sustaining objections raised by defendants' counsel, particularly during closing argument. Cheney

argues that his trial counsel was made to "look stupid" because his closing argument was repeatedly interrupted by frivolous objections that were sustained.

"In conducting closing argument, attorneys for both sides have wide latitude to discuss the case." (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 795 (*Cassim*).) """"The right of counsel to discuss the merits of a case, both as to the law and facts, is very wide, and he has the right to state fully his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom. The adverse party cannot complain if the reasoning be faulty and the deductions illogical, as such matters are ultimately for the consideration of the jury."""" (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 798-799.) "'An attorney is permitted to argue all reasonable inferences from the evidence, . . .' [Citation.] 'Only the most persuasive reasons justify handcuffing attorneys in the exercise of their advocacy within the bounds of propriety.'" (*Id.* at p. 799.)

Cheney specifically complains of nine instances when his counsel's closing argument was interrupted. Of these, we find that five objections (on pages 543, 547-548, 551, 558, and 559 of the reporter's transcript) were potentially improperly sustained. This does not lead us to reverse, however.

The California State Constitution provides that "'[n]o judgment shall be set aside, or new trial granted, in any cause, . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' (Cal. Const., art. VI, § 13.) 'The effect of this provision is to eliminate any presumption of injury from error, and to require that the appellate court examine the evidence to determine whether the error did in fact prejudice the [party]. Thus, reversible error is a relative concept, and whether a slight or gross error is ground for reversal depends on the circumstances in each case.' [Citation.]" (*Cassim*, *supra*, 33 Cal. 4th at p. 800.)

We find, based on our review of the record, and examining the totality of circumstances, that the trial court's possible over-exuberance in sustaining objections made during closing argument was not reversible error. First, it does not appear from the

record that the closing argument given by Cheney's counsel was repeatedly interrupted. Although plaintiff's counsel raised at least nine objections during closing argument, the closing argument itself was relatively lengthy, covering 32 pages of reporter's transcript. Moreover, at the end of the closing argument, the trial court instructed the jury as follows: "Ladies and Gentlemen, we do have rules of evidence and procedures that the parties have to follow. I just want to make it clear, even though I may have to sustain an objection or prohibit an attorney from saying something or doing something, you're not to hold that against the attorney or the side the attorney represents." Absent a contrary indication in the record, we assume that the jury follows the trial court's instructions. (*Cassim*, *supra*, 33 Cal.4th at p. 804.) There is no reason to assume that the jury reacted to the sustained objections by penalizing Cheney.

Cheney points to *Haluck v. Ricoh Electronics, Inc.* (2007) 151 Cal.App.4th 994, in which the trial judge's conduct was found to be "sufficiently egregious and pervasive that a reasonable person could doubt whether the trial was fair and impartial." (*Id.* at p. 997.) The facts in that case were starkly different from those here, however. The *Haluck* trial court judge engaged in a wide-ranging display of impartial and bizarre behavior, including: reviewing a videotape for admissibility in his chambers with only defendants' counsel present, not inviting plaintiffs' counsel (*id.* at pp. 1002-1003); helping create a "circus atmosphere" by allowing defendants' counsel to repeatedly make snide remarks, including badgering a witness with the *Twilight Zone* theme song (*id.* at p. 1003); holding up hand-made "overruled" signs (including one presented by defense counsel) when ruling on objections (*id.* at pp. 1003-1004); overruling plaintiffs' objections in a demeaning manner (*id.* at p. 1004); overruling an objection on the basis of "'Objection, 187'" "'murder'" (*id.* at p. 1005); using a "'soccer-style'" "'red card'" procedure to fine counsel, particularly plaintiffs' counsel, for unsuccessful objections (*id.* at pp. 1005-1006); and disparaging plaintiff and his lawyer by uttering, "'aren't they clever'" (*id.* at p. 1006). No similar disparaging or unfair treatment was on display in this case.

It is also clear from the record that the jury's verdict was well supported by the evidence. As testified by defendants' accident reconstruction expert, Cheney did not

begin braking until well after the box truck lost control, and finally applied his brakes just 1.6 seconds before impacting Crocker's car. There was also substantial evidence for the jury's determination that Cheney's failure to wear a seatbelt affected the severity of his injuries. It is not reasonably possible that the jury would have reached a different verdict if the closing argument given by Cheney's counsel had gone uninterrupted. Thus, reversal is unwarranted.

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.